

D.T.E. 02-86

June 2, 2003

Complaint of Schreiber and Associates, P.C. and S&A Services of Watertown, Ltd. Regarding
CTC Communications Corporation

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FOR: SCHREIBER AND ASSOCIATES, P.C.
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Complainants

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I. INTRODUCTION AND PROCEDURAL HISTORY

On December 20, 2002, the Department of Telecommunications and Energy (“Department”) received a Petition Seeking Investigation and Complaint (“Complaint”) from Schreiber and Associates, P.C. (“Schreiber”) and S&A Services of Watertown, Ltd. (“S&A Services”), alleging that CTC Communications Corporation (“CTC”) unjustly and unreasonably provided telecommunications services to Schreiber and S&A Services.¹ On January 3, 2003, the Department received CTC’s Answer to Schreiber/S&A Services’ Complaint. The Department docketed the matter as D.T.E. 02-86. On its own motion, the Department requested that the parties provide the Department with briefs addressing whether, and to what extent, the Department has jurisdiction to hear the Complaint, given the Department’s historical practice to limit customer complaint adjudications to residential customers only. Both CTC and Schreiber/S&A Services filed briefs and reply briefs addressing this jurisdictional question. Their positions are summarized below.

¹ According to the Complaint, Schreiber is a Massachusetts law firm concentrating in creditors’ rights, collection, and other legal matters (Complaint at 2). S&A Services is a New York corporation which operates a call center in New York that assists Schreiber in its collection activities (*id.*). Schreiber also operates a call center in Massachusetts (Schreiber/S&A Services Reply Brief at 12). The Complaint alleges the following service problems: 1) recurring and severe service failures; 2) failure to provide Caller ID services; 3) failure to provide direct inward dialing porting; and 4) inadequate and improper equipment installation (Complaint at 3-4).

II. POSITIONS OF THE PARTIES

A. Schreiber/S&A Services

Schreiber/S&A Services argues that its Complaint clearly falls within the ambit of the Department's broad supervisory powers over telecommunications carriers (Schreiber/S&A Services Brief at 3). Schreiber/S&A Services argues that CTC contracted through a customer service agreement to provide services to Schreiber/S&A Services pursuant to M.D.T.E. Tariff No. 10, and that CTC has provided those services in such a manner as to call into question CTC's technical, managerial, and financial capability to continue to provide its tariffed services (id.). Schreiber/S&A Services argues that it is "beyond question" that the Department has both the authority to investigate the issues raised by the Complaint and the authority to declare, after such investigation, that Schreiber/S&A Services' customer service agreement with CTC is null and void (id. at 4). Although S&A Services operates Schreiber's call center in New York, Schreiber/S&A Services asserts that, consistent with the Department's jurisdiction over intrastate services only, its Complaint does not address telecommunications services provided by CTC outside Massachusetts (Schreiber/S&A Services Reply Brief at 12).

In addition, Schreiber/S&A Services argues that CTC's recurring failures to provide adequate services to Schreiber/S&A Services were not in the nature of a billing error or a routine outage caused by events beyond CTC's control, but rather call into question CTC's general business practices (Schreiber/S&A Services Brief at 5). Therefore, Schreiber/S&A Services argues that not only is the matter clearly within the jurisdiction of the Department,

but that the Department has used that jurisdiction in the past to supervise the practices of other financially-distressed telecommunications carriers such as CTC (id. at 5-6).² Further, Schreiber/S&A Services argues that there is no indication that the Legislature intended to limit the Department's jurisdiction to residential customers only (id. at 6). Moreover, Schreiber/S&A Services argues that if the Department wished to make such a distinction concerning complaints about non-billing matters, the Department would have to cite definitive statutory grounds to do so or the Department would violate both the Massachusetts Administrative Procedures Act ("MAPA") (i.e., G.L. c. 30A) and the United States and Massachusetts Constitutions (id. at 6-7).

Schreiber/S&A Services argues that the "opportunity for a full and fair hearing" under G.L. c. 30A, § 10, does not grant a state agency, such as the Department, the discretion to apply G.L. c. 30A to some complaints and not to others (id. at 7). Rather, argues Schreiber/S&A Services, the Department's "discretionary" jurisdiction applies only to non-adjudicatory matters, such as rulemakings or investigations on the Department's own motion (id.). Schreiber/S&A Services argues that neither the MAPA nor G.L. c. 4, § 7 (which contains definitions of statutory terms), requires that "persons" that participate in agency or court proceedings be solely non-business entities (id.).³ Therefore, Schreiber/S&A Services argues that the Department cannot deprive business organizations such as Schreiber/S&A

² CTC is currently undergoing a reorganization under Chapter 11 of the United States Bankruptcy Code (Complaint at 2; CTC Brief at 10).

³ G.L. c. 4, § 7 cl. 23 states in part: "'Person' . . . shall include corporations, societies, associations and partnerships."

Services, the rights that are explicitly granted to them by statute (id.). To do so, argues Schreiber/S&A Services, would violate their constitutional rights because business entities, as well as natural persons, “may invoke the guaranty of equal protection of the laws assured by the Fourteenth Amendment” (id.).

In addition, Schreiber/S&A Services argues that even if the Department’s jurisdiction were purely discretionary, it would be appropriate for the Department to exercise its jurisdiction in the instant matter (id. at 8). This is because, argues Schreiber/S&A Services, its Complaint presents the Department with an opportunity to supervise the operations of a financially-distressed carrier, such as CTC, before CTC progresses to the point that a cessation of service is imminent and other customers experience service problems similar to those experienced by Schreiber/S&A Services (id. at 8-9).

Moreover, Schreiber/S&A Services argues that its Complaint is not “vague and ambiguous” as CTC contends, but rather follows the regulations describing the general form of initial pleadings to the Department (Schreiber/S&A Services Reply Brief at 2-3). As such, Schreiber/S&A Services argues that the detail CTC seeks is more appropriate for the discovery and hearing phase of a proceeding than an initial pleading (id. at 3). In addition, Schreiber/S&A Services argues that the Department should not decline to exercise its jurisdiction because CTC alleges its resources are scarce, but rather should exercise its jurisdiction to ensure more efficient use of those resources (id. at 11-12).

Finally, Schreiber/S&A Services argues that despite CTC’s contention that this dispute should be resolved in court, the doctrine of primary jurisdiction dictates that the Department

investigate and resolve the matters raised by the Complaint (id. at 4).⁴ Schreiber/S&A Services argues that the issues of tariff interpretation and application, as well as the Department's oversight of competitive local exchange carriers, are within the Department's technical expertise and explicit statutory mandate, and any court in which CTC might bring an action would defer to the Department's view on these matters (id. at 7). Therefore, Schreiber/S&A Services argues that the instant dispute should be heard by the Department in order to resolve the many issues that are within the Department's primary jurisdiction (id. at 10).

B. CTC

CTC argues that the instant matter is purely a commercial matter and is more appropriately resolved in court (CTC Brief at 4; CTC Reply Brief at 2). CTC argues that it has already filed suit in United States District Court for the District of Massachusetts ("district court") and that forum is the proper avenue to resolve both Schreiber/S&A Services' allegations of improper service and CTC's claims of non-payment (CTC Brief at 3-4). Furthermore, CTC argues that the Department determined unequivocally in Teleprocessing, Inc. v. Boston Edison Co., D.P.U. 91-34, at 9-10 (1992) ("Teleprocessing"), that questions of contractual liability involving business customers are best determined by the courts (CTC Reply Brief at 6). CTC argues that because the Department cannot award money damages, a

⁴ The doctrine of primary jurisdiction is a judicially created doctrine utilized to determine whether an administrative agency or a court should initially decide the issues in a controversy. See Alexander J. Cella, Administrative Law and Practice, Massachusetts Practice Series, Vol. 40, § 1724 (1986) ("Cella").

court is the proper forum because all of the parties' rights and liabilities may be adjudicated in one proceeding (CTC Brief at 5).

CTC argues that not only has the Department declined to promulgate rules and regulations governing the commercial relationships between carriers and business customers (unlike the rules governing relationships between telecommunications carriers and residential customers established in Rules and Practices Relating to Telephone Service to Residential Customers, D.P.U. 18448 (1977) ("Telephone Billing and Termination Rules")), but also that Schreiber/S&A Services has provided no credible basis, much less a compelling reason, to deviate from the Department's historical practice not to entertain service complaints initiated by business customers (*id.* at 4-5; CTC Reply Brief at 3-4). CTC argues that the claims raised by Schreiber/S&A Services plainly include allegations that affect Schreiber/S&A Services alone, and are distinguishable from the Department cases that Schreiber/S&A Services relies upon for jurisdictional support, such as the Department collocation security proceeding,⁵ which affects entire classes of competing telecommunications carriers, as well as business and residential customers (CTC Brief at 6; CTC Reply Brief at 4, 6). Moreover, CTC points out that the Department has already determined in a previous case that it would be administratively burdensome for the Department to exercise jurisdiction in all disputes raised by non-residential customers (CTC Reply Brief at 7, *citing* Teleprocessing at 9-10).

⁵ See Investigation by the Department of Telecommunications and Energy on its own Motion pursuant to G.L. c. 159, §§ 12 and 16, into the collocation security policies of Verizon New England Inc. d/b/a Verizon Massachusetts, D.T.E. 02-8, Vote and Order to Open Investigation (January 24, 2002).

CTC argues that, in addition to the Department's long-standing practice to decline jurisdiction over similar commercial disputes, there are other reasons why the Department should dismiss Schreiber/S&A Services' Complaint (CTC Brief at 7-8). Namely, CTC argues that the Complaint is so vague and ambiguous as to warrant dismissal based solely on the ground that it is virtually impossible to ascertain the basis of Schreiber/S&A Services' claims (id.). In addition, CTC argues that the relief that Schreiber/S&A Services seeks in its Complaint (i.e., a determination by the Department that the parties' customer service agreement is null and void) is an inappropriate attempt to inhibit or delay CTC's pending collection action against Schreiber/S&A Services already underway in district court (id. at 7-8). Also, CTC argues that the Department should decline jurisdiction over Schreiber/S&A Services' Complaint to prevent CTC's limited resources from being expended in a duplicative proceeding when all of the issues can be resolved in the pending district court case (id. at 10). CTC also argues that if the Department does accept jurisdiction over any aspect of Schreiber/S&A Services' Complaint, the scope of any Department inquiry would have to be narrowed to exclude consideration of issues regarding interstate services and any intrastate services provided by CTC to call centers operated by S&A Services located in New York state (CTC Reply Brief at 9-10).

Finally, CTC argues that Schreiber's assertion that the Department is required by both the Massachusetts Constitution and the MAPA to exercise jurisdiction over Schreiber/S&A Services' Complaint is without merit (id. at 7). CTC argues that Schreiber/S&A Services' Complaint raises no cognizable constitutional issue, nor does the MAPA prohibit an agency

from exercising – or refraining from exercising – its discretionary jurisdiction when circumstances warrant (id.). CTC therefore concludes that Schreiber/S&A Services' arguments are unsupported and should be rejected (id. at 7-8).

III. ANALYSIS AND FINDINGS

As this case requires the Department to assess the extent of our jurisdiction concerning Schreiber's complaint against CTC, we begin our analysis with a brief overview of the Department's authority over telecommunications carriers. While the Legislature has granted the Department statutory authority pursuant to G.L. c. 159 and c. 166 over telecommunications carriers operating in Massachusetts, that authority is not unlimited.⁶ For example, the Department does not have authority over wireless (other than fixed wireless local exchange service),⁷ internet, or interstate telecommunications services, as those services are regulated at the federal level. Rather, the Department's authority encompasses wireline

⁶ G.L. c. 159, § 12, states, in pertinent part:

The [D]epartment shall, so far as may be necessary for the purpose of carrying out the provisions of law relative thereto, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth . . .

- (d) The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment appertaining thereto, or utilized in connection therewith.

⁷ See Pole Access Rules, D.T.E. 98-36-A at 38-39 (2000).

telephone services within the Commonwealth of Massachusetts.⁸ In general, the Department's telecommunications consumer protection rules cover issues such as billing and termination requirements, discontinuation of service rules, and quality of service. See generally, Telephone Billing and Termination Rules;⁹ Mass Migration Requirements, D.T.E. 02-28 (2002); Verizon Alternative Regulation, D.T.E. 01-31-Phase II, at 95-101 (2003).

Schreiber argues that although it is a commercial, rather than a residential, customer of CTC, the Department has exercised jurisdiction over disputes involving commercial customers of utility companies in the past, and should do likewise in this instance. While we agree that the Department has not been precluded by the Legislature either under c. 159 or c. 164,¹⁰ from hearing disputes involving commercial customers of utility companies, the Department has

⁸ Because of this jurisdictional limitation to intrastate services only, it is clear that the Department does not have jurisdiction to hear a claim of unreasonable service provided to a customer located in another state. Therefore, S&A Services' allegations concerning telecommunications services provided by CTC to S&A Services' call center in New York are beyond our review and are dismissed. The remainder of our analysis pertains to claims regarding service provided by CTC in Massachusetts.

⁹ Commercial customers are specifically excluded from the Telephone Billing and Termination Rules by Rule 1.1(d) ("‘Customer’ means any past or present purchaser of telephone service supplied by the Company for *residential* purposes") (emphasis added).

¹⁰ G.L. c. 164 defines the Department's authority over the manufacture and sale of gas and electricity in Massachusetts. G.L. c. 164, § 76, states in part:

The [D]epartment shall have the general supervision of all gas and electric companies and shall make all necessary examination and inquiries and keep itself informed as to the condition of the respective properties owned by such corporations and the manner in which they are conducted with reference to the safety and convenience of the public

chosen to review such cases only when specific circumstances are present. For example, the Department has exercised its jurisdiction over disputes involving commercial customers of utility companies in circumstances when residential tenants were directly or indirectly affected by commercial accounts.¹¹ In addition, the Department has exercised jurisdiction when interpretations of tariffs or Department rules,¹² or a utility company's general business practices,¹³ were at issue. In a few circumstances, the Department has exercised its jurisdiction over disputes involving commercial customers of utility companies based on its "general supervisory authority" over gas and electric companies under G.L. c. 164.¹⁴ In

¹¹ See Carter v. Boston Gas Co., D.P.U. 917, at 2 (1984) (rooming house residents could be considered residential tenants); Brookline Realty Trust v. Boston Edison Co., D.P.U. 19862, at 6 (1979) (commercial account no longer affects residential tenants therefore petition dismissed) ("Brookline Realty Trust"); Burke v. Boston Gas Co., D.P.U. 19820, at 5-6 (1979) (commercial landlord not liable for service where there is no express or implicit agreement for landlord to pay for service); Gross v. Boston Edison Co., D.P.U. 19505, at 2-3 (1978) (contractual dispute between commercial customer and utility does not affect residential tenants and is more properly heard by courts) ("Gross").

¹² See Teleprocessing at 8 (Department exercised jurisdiction in dispute between commercial customer and utility because case properly raised issues concerning rate classification and tariff interpretation).

¹³ See Merrimack Paving Corp. v. Groveland Municipal Light Dept., D.P.U. 18708, at 1-2 (1977) (Department exercised its jurisdiction over general business practices of municipal electric company); Old State Trust v. Boston Edison Co., D.P.U. 18861, at 2 (1977) (commercial complainant may bring action under G.L. c. 164, § 92; Department has supervisory powers over the general business practices of electric companies under G.L. c. 164, § 76).

¹⁴ See Leonard Manufacturing Co. v. Boston Gas Co., D.P.U. 18953, at 2 (1977) (Department exercised jurisdiction over a dispute between utility company and a commercial customer using gas services to heat a storage building); People's Church v. Boston Gas Co., D.P.U. 1445, at 4 (1985) (residential billing regulations provide
(continued...))

addition, the Department has conducted several proceedings pursuant to our authority under G.L. c. 93, §§ 108-113, to address “slamming” complaints, in which the complainants were commercial customers of Massachusetts telecommunications carriers.¹⁵ Also, the Department has twice initiated investigations on its own motion when the bankruptcy or imminent bankruptcy of a Massachusetts telecommunications carrier created the likely possibility of a major service disruption to its Massachusetts customer base, including its commercial customers.¹⁶

However, for the following reasons, we conclude that the circumstances that have prompted our past exercise of jurisdiction over disputes involving commercial customers of utility companies are not present in Schreiber’s Complaint, and have not been brought to light on brief. First, although Schreiber argues that we should investigate CTC because it is undergoing a reorganization under Chapter 11 of the United States Bankruptcy Code in order to ensure that CTC can continue to provide telecommunications service, there is no indication

¹⁴(...continued)

guidance in case where church was billed at residential rate).

¹⁵ See Aronson Insurance Agency, Inc. v. Network Plus, Inc., D.T.E. 01-19-04 (2002) (complainant insurance company alleged its local and regional telephone services were switched to another provider without authorization).

¹⁶ See Broadview Networks, Inc., D.T.E. 02-14 (2002); Network Plus, Inc., D.T.E. 02-15 (2002). In these cases, commercial customers included hospitals, nursing homes, foreign consulates, and municipal governments. As a result of these cases, the Department initiated an industry collaborative to develop procedures to follow when a carrier, as a result of bankruptcy or other reason, exits all or a portion of the local exchange services market in Massachusetts and has a large customer base to migrate to other carriers. See Mass Migration Requirements, D.T.E. 02-28, at 1 (2002).

that CTC is in any danger of an immediate cessation of service such that emergency Department action is necessary, such as existed in our previous bankruptcy-related cases. In those cases, we acted where service to large numbers of customers and, in turn, service to customers of those customers (the latter category not in a position otherwise readily able to defend their interests) were implicated, rather than service to an individual contract customer, as here. Moreover, even if CTC was forced to exit some or all markets in Massachusetts, the mass migration requirements established in our D.T.E. 02-28 proceeding were designed to address such an eventuality with a minimum of disruption to customers.

In addition, we do not agree with Schreiber that its Complaint implicates issues that require interpretation of Department tariffs or rules, or issues concerning CTC's general business practices.¹⁷ Schreiber's allegations of inadequate service by CTC to Schreiber, as described in the Complaint and expounded upon through the briefing process, require determinations of contractual liability pursuant to their customer service agreement, and Schreiber's claims do not raise policy issues or contain broad implications that affect customers other than Schreiber.¹⁸ The parties' disagreement here is a "plain vanilla" billing

¹⁷ Schreiber has not alleged claims related to CTC's residential customers or slamming-related matters; therefore, we do not address potential jurisdiction under these bases.

¹⁸ If a number of CTC's customers were aggrieved by CTC's actions, the customers would have the option of petitioning the Department for action pursuant to G.L. c. 159, § 24, under which the Department would be required to hold a public hearing following receipt of a written complaint "relative to the service or charges for service . . . made by any company engaged in the transmission of intelligence by electricity, by the mayor or selectmen, or by twenty customers of the company" See Verizon Massachusetts, D.T.E. 99-77, at 1 n.2 (2001) (hearing held pursuant to G.L. c. 159, (continued...))

dispute pursuant to their service contract, and we reiterate our conclusions in Teleprocessing at 8 and Gross at 3, that matters of contractual liability in such cases are best determined by the courts.¹⁹ As these parties already have a pending action in district court in which these matters can be addressed, such a conclusion is particularly appropriate here.

In closing, we address Schreiber's assertion that the Department's failure to exercise jurisdiction over Schreiber's Complaint against CTC would be a violation of the MAPA, and the Massachusetts and United States Constitutions. We do not agree. We have long held that, absent an issue involving general business practices with widespread effects on numerous, similarly placed customers, it would be administratively burdensome to exercise Department jurisdiction over all disputes between utility companies and their commercial customers. See Teleprocessing at 9-10. To manage our dockets in such a manner is not in violation of our responsibilities under the MAPA. G.L. c. 30A does not, in and of itself, create a right to an adjudicatory hearing to all those who seek an administrative agency's determination of a dispute.²⁰ Rather, the right to an adjudicatory proceeding is defined in c. 30A in terms of

¹⁸(...continued)

§ 24, relative to telecommunications service provided in Athol, Petersham, Phillipston, Royalston and Franklin County).

¹⁹ See also, Brookline Realty Trust at 5 ("For those users who do not fall within the scope of the [gas, electric, and water billing and termination] regulations, their recourse in resolving contested billings or practices is in the courts"). The gas, electric, and water billing and termination regulations, found in 220 C.M.R. §§ 25.00 et seq., define "customer" as a user of gas, electricity, or water billed on a residential rate. 220 C.M.R. § 25.01(2).

²⁰ This is particularly true where one of the parties subject to a complaint filed with the
(continued...)

constitutional or state statutory right. See Cella, Vol. 39, § 508.²¹ As Schreiber has access to a court in which its allegations may be fully addressed, we do not contemplate a constitutional violation of equal protection under the law, as Schreiber has alleged (see Schreiber/S&A Services Brief at 6-7), or a violation of our responsibility to govern telecommunications carriers consistent with G.L. c. 159.

The Department's focusing on resolving residential customers' disputes does not deny a remedy to commercial or industrial customers, who are better positioned to take their disputes with their utility to Superior Court. Focusing in this way makes more efficient use of the Department's limited resources. Moreover, because all adjudications under G.L. c. 30A, § 10, are directly appealable under G.L. c. 25, § 5, to the Supreme Judicial Court, such a focus prevents potential overtaxing of the high court's docket. Commercial customers still have a remedy in Superior Court, and most disputes will likely be resolved either before trial or, if tried to a conclusion, without subsequent appeal.

²⁰(...continued)

Department has already initiated a proceeding in a court of competent jurisdiction in a position to provide an adequate forum for resolution of all related issues (see CTC Brief at 3-4).

²¹ G.L. c. 30A, § 1(1) states that the right to an adjudicatory hearing exists where the legal rights, duties, or privileges of specifically named persons are required "by constitutional right or by any provision of the General Laws" to be determined after an opportunity for a hearing.

IV. ORDER

After due notice and consideration, it is

ORDERED: That the Petition Seeking Investigation and Complaint of Schreiber and Associates, P.C. and S&A Services of Watertown, Ltd. dated December 20, 2002, is dismissed.

By Order of the Department,

_____/s/_____
Paul B. Vasington, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).